No. 7[redacted]240

FILED
DEC 16 1918
JAMES D. MAHE
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IN THE

Supreme Court of the United States

E. W. BLISS COMPANY,
Appellant,

vs.

THE UNITED STATES,
Appellee.

Appeal from the Court of Claims.

PETITION FOR CERTIORARI FOR DIMINUTION OF RECORD

AND

BRIEF THEREON.

ARTHUR C. FRASER,
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IN THE

Supreme Court of the United States

E. W. BLISS COMPANY, Appellant, vs. THE UNITED STATES, Appellee.	Appeal from the Court of Claims.

Petition for Certiorari for Diminution of Record.

To the Honorable Justices of the Supreme Court of the United States:

The petition of E. W. Bliss Company, appellant, respectfully shows to this honorable Court that there is diminution of the record certified to this Court by the Court of Claims by reason of the omission therefrom of the following pleadings and proceedings, and the incorrect statement concerning the proceedings, namely:

1. Plaintiff's original petition, filed May 29, 1914 (at least, so much of this should be certified as to show wherein it differed from the amended petition filed March 28, 1917).

2. Motion by defendant to dismiss, filed April 12, 1916 (without this paper it does not appear what motion was overruled on December 4, 1916).

3. Defendant's motion to strike out, filed December 13, 1916 (this paper is necessary to show that this motion was on a specific ground, different from original motion to dismiss, filed April 12, 1916).

4. Demurrer and motion to strike out, filed April 7, 1917 (this paper is necessary to show the grounds of the demurrer and motion).

5. Motion, filed February 18, 1918, for leave to file second amended petition, with appended affidavit.

6. Second amended petition (referred to in said motion) which was presented to the Court February 18, 1918, but was not placed on file.

7. Motion for leave to file petition for rehearing (with statement that such motion was submitted to the Court February 19, 1918, but was not permitted to be filed until June 3, 1918), with appended affidavit.

8. Petition for rehearing, with a statement that this was presented to the Court February 19, 1918, with motion for leave, but was never permitted to be filed.

A copy of each of the foregoing papers or proceedings is hereunto appended.

9. Under "VI. Argument and Submission of Above Motion," the proceeding should be stated thus:

> On October 29, 1917, the defendant's demurrer to and motion to strike out certain para-

graphs of amended petition was submitted for decision on the briefs for both parties already filed.

WHEREFORE your petitioner prays that a writ of certiorari may be issued out of and under the seal of this Court directed to the Court of Claims of the United States, commanding the said Court to certify and send to this Court on a day certain to be therein designated, the full and complete transcript of all and every part of the record and proceedings of the said Court in the said cause therein entitled "E. W. Bliss Company v. The United States," No. 32,838, not embodied in the transcript on appeal in the said cause already filed in this Court, and specifically those papers and proceedings herein set forth under the above paragraphs, numbers 1 to 8, both inclusive.

Dated New York, December 13, 1918.

E. W. BLISS COMPANY,
Petitioner,
By its Attorney,
ARTHUR C. FRASER.

Verification.

STATE OF NEW YORK,
CITY AND COUNTY OF NEW YORK, } ss.:

ARTHUR C. FRASER, being duly sworn, deposes and says that he is the attorney for the E. W. Bliss Company, the appellant named in the foregoing petition; that he is one of the counsel who conducted the proceedings in this suit in the Court of Claims, and is familiar with all such proceedings; that upon taking the appeal from said Court, there was filed in said Court an assignment of errors, a copy of which is hereunto appended; that in deponent's judgment and opinion, the errors therein assigned are each and all such as should be examined and passed upon by the Supreme Court on the present appeal; that such errors each go to some part or all of the claim of appellant, which is the subject of said suit in the Court of Claims; that the transcript of record as certified from said Court of Claims omits pleadings, papers and proceedings which are required to be examined and must be in the record on appeal in order that the Supreme Court may pass upon the errors assigned; that with said appeal deponent filed in the Court of Claims a praecipe for record, which included each and all of the papers named in the foregoing petition as lacking in said transcript of record as certified; and that deponent verily believes that the inclusion of all of said papers is essential to the full hearing, understanding and determination of the points on which appellant's appeal is based.

The copies of the papers named in said petition, which are hereunto appended, are true and correct copies thereof.

As to the correction named in Paragraph 9 of the foregoing petition, deponent says the facts are that after three arguments before the Court had been had on November 21, 1916, February 23, 1917, and May 23, 1917, and after the filing of numerous briefs, it was understood and agreed between deponent and the Assistant Attorney General prior to the submission of the demurrer and motion to the Court on October 29, 1917, that this case would be submitted without argument. This agreement was contained in a letter from the Assistant Attorney General, dated October 8, 1917, saying, *inter alia*, "Defendant is willing to submit this case without argument if that is agreeable to plaintiff," and deponent's reply thereto, dated October 20, 1917, saying, *inter alia*, "Accordingly, and in view of your last letter, it is our understanding that the case will be submitted and that there will be no oral hearing on October 29." Deponent desires correction because the statement in the certified transcript that the matter "was argued and submitted by Mr. H. C. Workman for the defendants, counsel for claimant not being present" contradicts the agreement of counsel and makes it appear that deponent permitted the argument to go by default.

ARTHUR C. FRASER.

Sworn to and subscribed before me this 13th day of December, 1918.

T. F. WALLACE,
Notary Public,
New York Co., N. Y.

(Seal)

Appendix 1.

IN THE COURT OF CLAIMS.

E. W. BLISS COMPANY vs. THE UNITED STATES.	No. 32,838.

Filed May 29, 1914.

Petition.

To the Honorable the Judges of the Court of Claims:

The petition of the E. W. Bliss Company respectfully shows:

1. That petitioner is a corporation duly incorporated and existing under the laws of West Virginia, having its principal office in the Borough of Brooklyn, City and State of New York.

2. The petitioner is the maker and owner of the Bliss-Leavitt torpedo, which it has made for many years for the United States Government. That defendant, in addition to such purchase of torpedoes from petitioner, has also at various times, purchased torpedoes of Whitehead & Company, an English corporation, and has also itself made various parts of torpedoes in the United States.

3. That petitioner now is, and at all times since the grant and assignment to it of the letters patents hereinafter referred to has been the sole and exclusive owner of the invention and improvements

thereof covered by said letters patents. That the device or structure embodying said inventions is generally known as, and hereinafter will be designated as, a "superheater." That said superheater is a device whereby fuel is burned in the compressed air driving the motor by which the torpedo is propelled, so that the compressed air is heated to a high degree before its energy is utilized, and by means of which its energy is vastly increased.

4. That said superheater invention was covered by letters patent of the United States, No. 693,871, duly granted on February 25, 1902, to petitioner, as the assignee of the inventor, Frank M. Leavitt, of Brooklyn, New York, the assignment, dated December 21, 1898, having been duly recorded in the United States Patent Office on January 31, 1902, in Liber D, 64, page 467, of Transfers of Patents, and by letters patent of the United States, No. 693,872, duly granted on February 25, 1902, to petitioner, as the assignee of the inventor, Frank M. Leavitt, said assignment, dated January 23, 1902, having been duly recorded in the United States Patent Office January 31, 1902, in Liber D, 64, page 468, of Transfers of Patents.

5. That certain improvements in said superheater were covered by the following letters patent of the United States, duly granted to Sir W. G. Armstrong, Whitworth & Co., Limited, as the assignee of William H. Sodeau, of Newcastle-upon-Tyne, England, and of said William H. Sodeau and Edward W. Lloyd, said assignments having been duly recorded in the United States Patent Office:

No. 827,891, granted August 7, 1906;
No. 828,432, granted August 14, 1906;
No. 835,262, granted Nov. 6, 1906;
No. 850,307, granted April 16, 1907;
No. 944,975, granted Dec. 28, 1909;
No. 964,574, granted July 19, 1910;
No. 1,008,871, granted Nov. 14, 1911;
No. 1,009,024, granted Nov. 14, 1911.

That said patents were subservient to said patents Nos. 693,871 and 693,872 and could not be used in torpedoes without employing the invention covered by said last named patents.

That by written instrument duly executed and delivered on or about April 10, 1905, said Sir W. G. Armstrong, Whitworth Company, Limited, for a valuable consideration, duly assigned, transferred and set over to petitioner the sole, full and exclusive right, license and privilege of making, using and selling the said inventions covered by said letters patent, together with all future improvements therein or additions thereto in or for torpedoes for the use of the United States Government throughout the United States during the whole term of said letters patent.

6. That petitioner now is the owner as aforesaid of all the rights and privileges granted and secured or intended to be granted and secured in and by said letters patent, and has been such owner since the granting of said respective patents.

7. That the said Frank M. Leavitt was the true, original and first inventor of the said invention and improvements thereon patented in said letters patent, Nos. 693,871 and 693,872, that the same were not known or used by others in this country

before his invention or discovery thereof, and not patented or described in any printed publication in this or any foreign country before his invention or discovery thereof or more than two years prior to his application for said letters patent, Nos. 693,871 and 693,872, or either of them, and had not been in public use or on sale in this country for more than two years prior to his said respective applications. and which had not been abandoned to the public, and for which no application for a patent in a foreign country had been filed by the said Frank M. Leavitt or his legal representatives or assigns more than seven months prior to the filing of said application for said patent No. 693,871, or said application for said patent No. 693,872.

8. That the said William H. Sodeau was the true, original and first inventor of the improvements on said superheater patented in said letters patents Nos. 827,891; 828,432; 835,262; 944,975; 964,574; 1,008,871, and 1,009,024, that the same were not known or used by others in this country before his respective invention or discovery thereof and not patented or described in any printed publication in this or any foreign country before his respective invention or discovery thereof or more than two years prior to his respective applications for said letters patents Nos. 827,891; 828,432; 835,262; 944,975; 964,574; 1,008,871 and 1,009,024, and which had not been in public use or on sale in this country for more than two years prior to his said respective applications and which had not been abandoned to the public, and for which no application for a patent in a foreign country had been filed by the said William H. Sodeau or his legal representatives or assigns more than twelve months

prior to the respective filing of the applications for said patents Nos. 827,891; 828,432; 835,262; 944,975; 964,574; 1,008,871 and 1,009,024.

8a. That the said William H. Sodeau and Edward W. Lloyd were the true original and joint inventors of the improvements on said superheater patented in said letters patent No. 850,307, that the same was not known or used by others in this country before their said invention or discovery thereof and not patented or described in any printed publication in this or any foreign country before their said invention or discovery thereof, or more than two years prior to their application for said letters patent No. 850,307, and which have not been in public use or on sale in this country for more than two years prior to their said application and which had not been abandoned to the public, and for which no application for a patent in a foreign country had been filed by the said William H. Sodeau and Edward W. Lloyd, or their legal representatives or assigns, more than twelve months prior to the filing of the application for said patent No. 850,307.

9. That on or about October 18, 1906, the defendant through its Bureau of Ordnance of the Navy Department, in written communications, bearing said date, requested a list of petitioner's patents covering the Bliss-Leavitt torpedo and the amount of royalty which petitioner would charge defendant for the use thereof. That on or about November 24, 1906, petitioner furnished such list in writing, which included said superheater patents. That subsequently, and on or about June 14, 1907, defendant by telegraph requested permission of petitioner to purchase a limited number of torpedoes from Whitehead & Company, an English corpora-

tion, containing said superheater inventions. That petitioner on same day replied by telegraph that it desired to render every assistance to the Government on a proper business basis. That thereupon, and on or about June 17, 1907, the officers of petitioner conferred with Admiral Mason, Chief of the Bureau of Ordnance, at Washington, and it was agreed between them that the Gomernment might purchase not more than 100 torpedoes from Whitehead & Company, the amount of the royalty for the use therein of said superheater inventions to be later settled and agreed upon by the defendant and petitioner. That subsequently defendant bought of Whitehead & Company, pursuant to said agreement, fifty torpedoes containing said superheater inventions, which were, as petitioner is informed and believes, brought into the territory of the United States subsequent to June 1, 1908. That on or about November 9, 1907, defendant, through its said Bureau of Ordnance, by letter bearing said date, stated, "The Bureau desires to take the subject of royalties under consideration for final settlement and requests that the company will submit proposals covering the following points: * * * (b) Royalty to be paid by the Government for the manufacture of gyro and superheater for installation in Whitehead or other type of torpedo. (c) Price to be paid for superheaters and gyros manufactured by the E. W. Bliss Company and installed by the Government in Whitehead or other type of torpedoes." That thereupon petitioner replied by letter dated November 25, 1907, "Referring to your letter of November 9th, in regard to royalties on Bliss-Leavitt torpedo, and in confirmation of verbal proposition made by the officers of this company to you at Sag Harbor a few days ago, beg to state

that we consider the following royalties and prices to be fair. * * * (3) Royalty to be paid by the Government for the manufacture of superheaters for installation in Whitehead or other type of torpedo, five hundred dollars ($500). (4) Price to be paid for superheaters manufactured by E. W. Bliss Company and installed by the Government in Whitehead or other type of torpedoes, six hundred fifty dollars ($650)." That defendant, through its said Bureau, by letter dated November 29, 1907, acknowledged receipt of said letter of November 25, 1907, and stated that the matter would be laid before the Torpedo Board at its meeting on December 3, 1907, and invited petitioner to attend. That petitioner, by its executive officers, attended said meeting and explained the reasonableness of said royalty to the members of the Torpedo Board. That thereafter, and on or about June 4, 1908, by contract bearing said date, the defendant agreed to pay petitioner six hundred fifty dollars ($650) each, for twenty superheaters containing said patented inventions and improvements or some of them. That said contract was duly performed and the price paid. That defendant, on or about December 12, 1910, by letter bearing said date, referred to the superheater royalty specified in petitioner's letter of November 25, 1907, and requested a reduction thereof. That petitioner replied by letter dated December 20, 1910, declining to reduce the amount of said royalty. That thereafter, and on or about April 18, 1911, by contract bearing said date, petitioner agreed to furnish 75 superheaters containing said patented inventions and improvements or some of them to the Government at six hundred fifty dollars ($650) each. That said contract was duly performed and the contract price

paid. That defendant, by letter dated April 27, 1911, requested additional superheaters to replace ones on which the royalty had already been paid, and requested that for this reason, the price for these new superheaters be reduced. That accordingly, on or about June 16, 1911, by contract bearing said date, petitioner agreed to supply 100 superheaters containing said patented inventions and improvements or some of them at two hundred dollars ($200) each. That said contract was duly performed and the purchase price paid. That thereafter, and on or about March 13, 1912, by letter bearing said date, defendant repeated its request of December 20, 1910, for a reduction of the five hundred dollars ($500) royalty for superheaters. That petitioner by letter dated March 19, 1912, declined to grant any reduction and no reduction has ever been granted, and petitioner has never consented to the use of said patented inventions or said patented improvements thereon or any of them by defendant without payment of said royalty of five hundred dollars ($500) each.

10. That in addition to the 50 torpedoes purchased by defendant from Whitehead & Company, as set forth in the preceding paragraph of this petition, defendant has purchased from the same company other torpedoes containing some or all of said patented superheater inventions and improvements, namely, 130 torpedoes on or about July 7, 1908; 180 torpedoes on or about March 29, 1911; and 50 torpedoes on or about October 25, 1911. That in addition, defendant has made since April 15, 1913, or is engaged in making, 100 superheaters in the United States which contain said patented superheater and said patented improvements thereon or some of them.

11. That the fair and reasonable royalty for each of said superheaters is $500, which is also the stipulated and agreed royalty as above stated.

12. That petitioner on or about May 2, 1913, and at various other times, has demanded from defendant payment of said royalty of $500 for each of the 510 superheaters referred to in the preceding paragraphs of this petition, but defendant has wholly failed and neglected to pay any part thereof, and, by reason of the premises, the defendant is justly indebted to your petitioner in the sum of two hundred and fifty-five thousand dollars ($255,000), which sum is still due and unpaid.

13. That the petitioner is the sole owner of the claim set forth in this petition, no assignment or transfer of the said claim or of any interest therein having ever been made, and that petitioner is justly entitled to the amount herein claimed from the United States after allowing all just credits and offsets.

14. That no action upon your petitioner's claim has been had by or before Congress or any executive department of the Government except that petitioner brought the subject of its claim to compensation for the use of said invention by the United States to the attention of the Secretary of the Navy by letter of May 2, 1913, and that thereafter your petitioner was informed by the Assistant Secretary of the Navy that the necessary proceedings for the consideration and adjustment of said claim should be instituted in this Honorable Court.

15. That petitioner is as aforesaid a domestic corporation organized under the laws of West Virginia,

and that petitioner has at all times borne true allegiance to the Government of the United States and has not in any way voluntarily aided, abetted or given encouragement to rebellion against the said Government; that neither petitioner nor any assignee of petitioner's has at any time brought or has now pending in any court any suit or process against any other person, firm or corporation acting or professing to act mediately or immediately under the authority of the United States for or in respect of the claim herein presented.

16. That the facts stated in this petition are true.

Whereupon your petitioner asks judgment in its favor against the United States for the said sum of $255,000.

The petitioner's address is Brooklyn, New York. The address of its attorneys, Bacon & Milans, is 908 G Street, N. W., Washington, D. C.

E. W. BLISS COMPANY,
By F. C. B. PAGE,
Vice-President.

(Sgd.) L. S. BACON,
Attorney for Claimant.

FRANK H. PLATT,
ARTHUR C. FRASER,
Of Counsel.

EASTERN DISTRICT OF NEW YORK,
CITY OF NEW YORK,
BOROUGH OF BROOKLYN, } ss.:

F. C. B. PAGE, being duly sworn according to law, says that he is the Vice-President of the E. W. Bliss Company, the petitioner named in the foregoing petition; that he has read the said petition and knows the contents thereof, and that the facts stated in the said petition are true to the best of his knowledge, information and belief.

F. C. B. PAGE.

Sworn to and subscribed to before me this 28 day of May, 1914.

GEO. A. MURRAY,
(Seal) Notary Public No. 47,
Kings County,
New York.

[Filed May 29, 1914.]

Appendix 2.

IN THE

COURT OF CLAIMS OF THE UNITED STATES.

E. W. BLISS COMPANY v. THE UNITED STATES.	No. 32,838.

Motion to Dismiss.

Now comes defendant, by its Attorney General, and moves the Court to dismiss the petition, for that the same does not allege facts sufficient to constitute a cause of action against this defendant, nor any cause of action of which this Court has jurisdiction.

The grounds for the motion are:

That no express contract to pay plaintiff the royalty claimed or any royalty for the 510 torpedoes alleged to have been purchased and made by defendant is shown.

That, from the facts and things alleged in the petition, no contract to pay plaintiff the royalty claimed or any royalty for the 510 torpedoes complained of can be implied.

The Court is respectfully requested to set a time for an oral hearing of this motion and to make such order regarding filing and serving briefs thereon as may seem meet and just to the parties.

HUSTON THOMPSON,
Assistant Attorney General.

H. C. WORKMAN,
Attorney.

[Filed April 12, 1916.]

Appendix 8.

IN THE

COURT OF CLAIMS OF THE UNITED STATES.

E. W. BLISS COMPANY v. THE UNITED STATES.	No. 32,838.

Defendant's Motion to Strike Out.

Now comes defendant, by its Attorney General, and moves the Court to strike out from the petition the following, viz.:

Paragraphs numbered 5, 6, 8 and 8a on pages 2, 3, 5, and 5 of the printed petition.

The grounds for the motion are:

As shown in the petition, plaintiff is not the owner of any of the eight patents referred to in said paragraphs; that it has not the legal title thereto; that it is only a licensee with a limited license under said patents and has, therefore, no right to maintain this suit thereon.

As a further ground for the motion it is pointed out that the expense required to analyze separately each one of these patents and their several claims, to investigate the prior art as to each one of them, and the expert testimony required to bring the same before the Court and explain the nature, operation

and function of the several patents and of all the devices of the prior art found to be pertinent is so great—not to mention the expense of printing the same—that it should not be incurred if plaintiff has no title to sue thereon.

HUSTON THOMPSON,
Assistant Attorney General.

H. C. WORKMAN,
Attorney

[Filed December 13, 1916.]

Appendix 4.

IN THE

COURT OF CLAIMS OF THE UNITED STATES.

E. W. BLISS COMPANY v. THE UNITED STATES.	No. 32,838.

Demurrer and Motion to Strike Out.

Now comes defendant, by its Attorney General, and demurs to, and moves the Court to strike out of, the amended petition, paragraphs numbered 5 (*a*), (*b*), (*c*), (*d*), (*e*), (*f*), (*g*), (*h*), 6, 8, 8*a*, and 10*a* (pp. 2-8, 11-12).

The ground of the demurrer and motion is that plaintiff is not the owner of the letters patent, nor of any of them, specified in said paragraphs, particularly paragraphs 5 (*b*) and 5 (*c*), nor of any part thereof or of any right granted thereby; and that plaintiff has no right to sue thereon.

HUSTON THOMPSON,
Assistant Attorney General.

H. C. WORKMAN,
Attorney.

[Filed April 7, 1917.]

Appendix 5.

IN THE

COURT OF CLAIMS OF THE UNITED STATES.

E. W. BLISS COMPANY vs. THE UNITED STATES.	No. 32,838.

Motion for Leave to File Second Amended Petition.

Now comes plaintiff, E. W. Bliss Company, and asks leave of Court to file the accompanying second amended petition.

The grounds in support of the application are:

1. The amended petition is in part a direct compliance with the order of Court entered December 3, 1917, requiring plaintiff to make its petition more specific as to the claim involved in the purchase of 50 Whitehead torpedoes containing superheaters. This portion of the amended petition is contained in paragraph 9 (*b*) and (*c*).

2. The amended petition contains a more full recital of the relations and transactions between plaintiff and the defendant, represented by the Bureau of Ordnance of the Navy Department, showing or tending to show that defendant at all times recognized plaintiff's patents and plaintiff's title thereto, and the merit of the superheater inventions covered thereby, and never questioned either the value

of said inventions or the validity of said patents, or the sufficiency of plaintiff's title thereto, but contended only that the royalty fixed by plaintiff should be diminished.

3. The amended petition contains in paragraph 10 a more full recital of the facts concerning the subsequent purchases of Whitehead torpedoes containing said patented superheaters

4. Said amended petition introduces in paragraph 5 (*i*) a further allegation concerning the consideration tendered by plaintiff to the Armstrong Company concerning the rights derived by plaintiff from said Armstrong Company under the Sodeau patents.

The several amendments are intended to make a more full, clear and extended presentation in plaintiff's pleading of plaintiff's claim, in order that plaintiff's petition may be free from ambiguity and may lay a full foundation for a finding of fact on the pleading that plaintiff's claim is based upon a contract, express or implied, with the defendant.

Dated February 14, 1918.

E. W. BLISS COMPANY,
By its Attorney,
ARTHUR C. FRASER.

STATE OF NEW YORK,
CITY AND COUNTY OF NEW YORK, } ss.:

ARTHUR C. FRASER, being duly sworn, says:

I am of counsel for E. W. Bliss Company, plaintiff in this suit, and have had the active charge thereof. Plaintiff's attorney of record was L. S. Bacon, of Washington, D. C., who died December 6, 1917, after

an illness which, I am informed and believe, had incapacitated him from all business from a time prior to December 3, 1917. On learning of his death several days thereafter I caused an inquiry to be made at the Clerk's Office of the Court of Claims to see if any decision had been handed down in this case, and received in return printed copies of the Court's opinion of December 3, 1917, which reached me on or about December 14, 1917, but received no copy of any order, and I never learned that the order dated December 3, 1917, had been made until I received on January 29, 1918, a copy of such order which was sent me in response to an inquiry instituted by me. I then learned for the first time that the Court had required plaintiff's petition to be amended by January 15, 1918.

On receiving said opinion I at once sent a copy thereof to my associate and senior counsel, Frank H. Platt, Esq., and requested a conference with him. Not hearing from him, I learned shortly afterward that he was confined to his home by a serious illness which ever since has incapacitated him from conducting legal business.

On receiving said opinion I immediately took steps to procure the further information required to prepare amendments to plaintiff's petition as required by said opinion. I particularly asked information as to the dates of purchase, delivery, importation and use of the 50 torpedoes referred to in paragraph 9 of plaintiff's petition. On receiving said order on January 29, 1918, having not yet received such information, I wrote to the Assistant Attorney General asking that he procure for me such information, which I received from him on February 7, 1918. Meanwhile I was engaged in preparing amendments to said petition, the present

petition for leave and petition for rehearing, and a brief supporting the latter, which are about to be filed, all of which have been prepared as diligently as was practicable.

Until January 29, 1918, I was unaware that plaintiff was under any time limit in amending its petition. In all my practice for many years past in various courts, I have never heretofore known of an instance where a party was put under a limit of time under court order without a copy or notice thereof being served upon such party or his attorney. I now understand that this Court expects attorneys to attend and learn of such notices of such orders, and the failure to thus receive notice of said order I believe to be due to the death of plaintiff's said attorney, L. S. Bacon.

The delay in preparing, printing and filing the accompanying second amended petition has been due to the facts above stated, and to my previous engagements on other court cases, and to the intervention under war rulings of several non-business days, and to shortage of help owing to the war, and generally to circumstances beyond my control. Accordingly, the Court is petitioned to accept the said petition for filing notwithstanding that it is not filed within the time limited in said order of December 3, 1917.

ARTHUR C. FRASER.

Sworn to and subscribed before me this 14th day of February, 1918.

T. F. WALLACE,
Notary Public (19),
(Seal) New York County, N. Y.,
New York County Register's No. 9006.

[Filed February 18, 1918.]

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Appendix 6

IN THE

Court of Claims

E. W. BLISS COMPANY vs. THE UNITED STATES.	No. 32,838.

Original Petition filed May 29, 1914.
First Amended Petition filed March 28, 1917.
Second Amended Petition filed February , 1918.*

SECOND AMENDED PETITION.

TO THE HONORABLE, THE JUDGES OF THE COURT OF CLAIMS:

The petition of the E. W. Bliss Company respectfully shows:

1. That petitioner is a corporation duly incorporated and existing under the laws of West Virginia, having its principal office in the Borough of Brooklyn, City and State of New York.

2. That petitioner is the maker and owner of the Bliss-Leavitt torpedo, which it has made for many years for the United States Government.

* The new matter introduced by this second amendment of the petition is herein distinguished by being in *italic type*.

This torpedo has been recognized and adopted by the Government and has always contained the superheater inventions hereinafter referred to, made under the letters patent hereinafter named. That defendant, in addition to such purchase of torpedoes from petitioner, has also at various times purchased torpedoes of Whitehead & Company, an English corporation, and has also itself made various parts of torpedoes in the United States.

3. That petitioner now is, and at all times since the grant and assignment to it of the Letters Patent hereinafter referred to has been, the sole and exclusive owner of the invention and improvements thereof covered by said Letters Patent. That the device or structure embodying said inventions is generally known as and hereinafter will be designated as a "superheater." That said superheater is a device whereby fuel is burned in the compressed air driving the motor by which the torpedo is propelled, so that the compressed air is heated to a high degree before its energy is utilized, and by means of which its energy is vastly increased, *so that a torpedo of a given size and having a compressed air flask or reservoir of a given capacity, containing air at a given pressure, and adjusted to travel at a given speed, has its range increased to at least two and one-half times, and, under the most improved engineering development, up to four times the range possible without such superheater. Said superheater is the principal element of the improvement whereby the Whitehead torpedo of a given size, and running at approximately 26 knots speed, has been increased in range from 1,000 yards to 3,500 yards. Said superheater has always been an important and distinguishing element of the Bliss-Leavitt torpedo, which, when first built, had*

at a speed of 27 knots a range of 3,500 yards, and in its later developments (prior to the beginning of the present action) had, at a speed of 28 knots, a range of 10,000 yards.

4. That said superheater invention was covered by Letters Patent of the United States No. 693,871, duly granted on February 25, 1902, to petitioner, as the assignee of the inventor, Frank M. Leavitt, of Brooklyn, New York, the assignment, dated December 21, 1898, having been duly recorded in the United States Patent Office on January 31, 1902, in Liber D 64, page 467, of Transfers of Patents, and by Letters Patent of the United States No. 693,872, duly granted on February 25, 1902, to petitioner, as the assignee of the inventor, Frank M. Leavitt, said assignment, dated January 23, 1902, having been duly recorded in the United States Patent Office January 31, 1902, in Liber D 64, page 468, of Transfers of Patents.

5. (a) That certain improvements in said superheater made by William Hollis Sodeau, of Newcastle-upon-Tyne, England, were acquired by Sir W. G. Armstrong, Whitworth & Company, Ltd. (hereinafter referred to as "Armstrong Company"), of the same place, and set forth in British Specification No. 25,003 of the 17th of November, 1904, and thereafter said Armstrong Company and petitioner did enter into a certain written instrument dated the 10th day of April, 1905, a true copy of which, marked "Appendix A," is hereunto annexed.*

(b) That said instrument was entered into in contemplation of an application for patent in the

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*Appendix A is printed with the Amended Petition, filed March 28, 1917, pages 15-19.

United States covering the same subject matter, and in due course two such applications for patent were filed and the following Letters Patent granted thereon to said Armstrong Company as the assignee of said William H. Sodeau (assignments thereof having been duly recorded in the United States Patent Office), namely:

No. 827,891, granted August 7, 1906, and
No. 828,432, granted August 14, 1906;

and that said Armstrong Company, upon the grant of said Letters Patent, notified petitioner thereof, and that said Letters Patent were for the same invention set forth in said English Specification No. 25,003 of the 17th of November, 1904.

(c) That said patents and each and all of the other subsequent patents hereinafter named were and are subservient to said patents Nos. 693,871 and 693,872, and could not be used in torpedoes without employing the invention covered by said last-named patents.

(d) That the effect of said written instrument was to grant unto petitioner and its assigns the sole and exclusive license and authority to make, use and vend the inventions of said Letters Patent Nos. 827,891 and 828,432 for the whole period of the terms thereof, in the manufacture of apparatus for heating compressed air for the purpose of propelling Bliss-Leavitt torpedoes wherever sold by petitioner, and Whitehead torpedoes sold only to the United States Government.

(e) That on the dates given below, the following Letters Patent of the United States were duly granted to said Armstrong Company as the assignee of said William H. Sodeau and of said William

H. Sodeau and Edward W. Lloyd (assignments thereof having been duly recorded in the United States Patent Office), viz.:

No. 835,262, granted November 6, 1906;
No. 850,307, granted April 16, 1907;
No. 944,975, granted December 28, 1909;
No. 964,574, granted July 19, 1910;
No. 1,008,871, granted November 14, 1911, and
No. 1,009,024, granted November 14, 1911.

(f) That pursuant to the provisions of Articles 8 and 10 of said written instrument (Appendix A), said Armstrong Company did from time to time communicate to petitioner the subjects-matter contained in and claimed by the several Letters Patent recited in the foregoing sub-paragraph (e), and did furnish petitioner with full information, drawings and designs concerning the same; and petitioner did thereafter adopt and incorporate in its Bliss-Leavitt torpedoes constructions of superheaters and appurtenances thereof (known as "outside superheaters" or "Armstrong superheaters") embodying wholly or in part the subjects-matter of said United States patents; and that petitioner upon so doing did notify said Armstrong Company to that effect and that royalties would be payable under said written instrument for such superheaters as sold to the United States; and that subsequently, upon making sales of said torpedoes containing said outside superheaters to the United States, petitioner did from time to time (as provided in Articles 4, 5 and 6 of Appendix A) account and pay to said Armstrong Company the royalties named in Article 4 of the said instrument for each and all of the torpedoes sold containing such outside superheaters; and said Armstrong Company did receive and accept and receipt for all of said royalties so paid.

(g) That it has been uniformly recognized and understood by and between said Armstrong Company and petitioner that the several United States Letters Patent named in this paragraph 5 are within and covered by said written instrument (Appendix A) as fully and effectively as if in terms recited therein; and that as respects said Letters Patent petitioner was entitled to and has enjoyed all the exclusive rights set forth in said written instrument; and that petitioner's rights under said written instrument concerning said patented superheaters for torpedoes have been exclusive of all others in so far as concerns Bliss-Leavitt and Whitehead torpedoes within and throughout the United States and for the use of the United States Government; and that the only known or existing torpedoes are said Whitehead and Bliss-Leavitt torpedoes, or others substantially like them, and that no other torpedoes are adopted, purchased, made or used by the United States or any other government; that said torpedoes are propelled by stored compressed air or other gas, and it is only to torpedoes so propelled that superheaters are applicable; and that no other torpedoes containing superheaters are known in the art or sold to, or used by, the United States Government; and that the facts herein stated have been true at all times from the date of said instrument (Appendix A) down to the present; and that, accordingly, petitioner has solely and exclusively been entitled to, and had and enjoyed, as respects all torpedoes, the protection resulting from the grant of said several Letters Patent and each of them.

(h) That from the date of said written instrument (Appendix A), and during the entire period referred to in the present petition and up to the present time, all the terms, conditions and cove-

nants of said written instrument have been fully executed, observed and lived up to, and said instrument has at all times been and is now in full force and effect.

(i) That one consideration for the grant by said Armstrong Company to petitioner of the rights conferred by said instrument (Appendix A) was a concurrent grant by petitioner to said Armstrong Company of similar rights in foreign countries for the manufacture, sale and use of superheaters for torpedoes according to foreign patents corresponding to said Leavitt patents hereinbefore referred to.

6. That petitioner now is the owner as aforesaid of all the rights and privileges granted and secured or intended to be granted and secured in and by said Letters Patent, and has been such owner since the granting of said respective patents.

6a. That the main benefit and advantage of superheaters in torpedoes is due to the inventions of said Leavitt patents, which were pioneer or generic inventions which for the first time in the art enabled the energy stored in the compressed air to be increased before utilizing such air to propel the engine driving the torpedo; and that the improvements of said Sodeau patents above named were directed to the more convenient location of the superheaters and to details of construction concerning them, and said Sodeau inventions were in the nature of improvements carrying forward or extending the results of the pioneer inventions of said Leavitt patents and were not themselves pioneer or generic inventions.

7. That the said Frank M. Leavitt was the true, original and first inventor of the said invention

and improvements thereon patented in said Letters Patent Nos. 693,871 and 693,872; that the same were not known or used by others in this country before his invention or discovery thereof, and not patented or described in any printed publication in this or any foreign country before his invention or discovery thereof or more than two years prior to his application for said Letters Patent Nos. 693,871 and 693,872, or either of them, and had not been in public use or on sale in this country for more than two years prior to his said respective applications, and which had not been abandoned to the public, and for which no application for a patent in a foreign country had been filed by the said Frank M. Leavitt or his legal representatives or assigns more than seven months prior to the filing of said application for said patent No. 693,871 or said application for said patent No. 693,872.

8. That the said William H. Sodeau was the true, original and first inventor of the improvements on said superheater patented in said Letters Patent Nos. 827,891, 828,432, 835,262, 944,975, 964,574, 1,008,871 and 1,009,024; that the same were not known or used by others in this country before his respective invention or discovery thereof and not patented or described in any printed publication in this or any foreign country before his respective invention or discovery thereof or more than two years prior to his respective applications for said Letters Patent Nos. 827,891, 828,432, 835,262, 944,975, 964,574, 1,008,871 and 1,009,024, and which had not been in public use or on sale in this country for more than two years prior to his said respective applications and which had not been abandoned to the public, and for which no application for a patent in a foreign country had been filed

by the said William H. Sodeau or his legal representatives or assigns more than twelve months prior to the respective filing of the applications for said patents Nos. 827,891, 828,432, 835,262, 944,975, 964,574, 1,008,871 and 1,009,024.

8a. That the said William H. Sodeau and Edward W. Lloyd were the true, original and joint inventors of the improvements on said superheater patented in said Letters Patent No. 850,307; that the same was not known or used by others in this country before their said invention or discovery thereof and not patented or described in any printed publication in this or any foreign country before their said invention or discovery thereof, or more than two years prior to their application for said Letters Patent No. 850,307, and which have not been in public use or on sale in this country for more than two years prior to their said application and which had not been abandoned to the public, and for which no application for a patent in a foreign country had been filed by the said William H. Sodeau and Edward W. Lloyd, or their legal representatives or assigns, more than twelve months prior to the filing of the application for said patent No. 850,307.

9. (*a*) *That the defendant, through its Bureau of Ordnance of the Navy Department, has at all times recognized and acknowledged petitioner's ownership of the Bliss-Leavitt torpedo and of the inventions and patented improvements comprised therein, including the said superheater inventions, and has recognized the validity of petitioner's patents for said superheater and the ownership of said patents or exclusive rights thereunder by petitioner. Said Bliss-Leavitt torpedo was first offered by peti-*

tioner to defendant in or about September, 1903, was exhibited and demonstrated to a board of naval officers, who reported thereon to the Chief of Ordnance October 13, 1903, saying: "The superheater device gives great advantages in speed and range" and "The board also believes that the superheater may profitably be applied to the 5 meter torpedoes now in use on battleships to increase their range," and reporting favorably on other features of said torpedo, and said board recommended the purchase of two torpedoes; and accordingly, in that year defendant contracted with petitioner for the purchase of two such torpedoes, and in June, 1904, further contracted for the purchase of fifty of said torpedoes, and in March, 1905, contracted for the purchase of fifty more of said torpedoes, and in November, 1905, contracted for the purchase of 300 more of said torpedoes, all of which torpedoes were duly manufactured, delivered and paid for. Since that time the Bliss-Leavitt torpedo has been further improved and the defendant has repeatedly contracted with petitioner for the purchase of additional torpedoes, so that the aggregate of such torpedoes so contracted for by the defendant prior to the beginning of the present action had reached a total of 1,598 torpedoes. Each and all of said torpedoes included a superheater according to the inventions of said Leavitt patents, and the more recent of such torpedoes have included superheater improvements of said Sodeau patents, or some of them. Said Bliss-Leavitt torpedo has become the standard torpedo of the United States Navy.

(*b*) That on or about October 18, 1906, the defendant, through its Bureau of Ordnance of the Navy Department (*having at that time contracted for the purchase from petitioner of over 400 of said Bliss-Leavitt torpedoes containing said su-*

perheater inventions), in *a* written communication bearing said date, *stated that the Bureau was considering the manufacture of torpedoes, and did not desire to infringe any patent rights, and to avoid doing so* requested a list of petitioner's patents covering the Bliss-Leavitt torpedo and the amount of royalty which petitioner would charge defendant for *manufacturing thereunder.* That on or about November 24, 1906, petitioner furnished such list in writing, which included said *Leavitt* superheater patents *and British patent No. 35,003 of 1904; and on or about December 1, 1906, petitioner, in writing, proposed as a royalty for the manufacture of the entire Bliss-Leavitt torpedo the sum of $750 per torpedo.*

(*c*) That subsequently, and on or about June 14, 1907, defendant by telegraph requested permission of petitioner to purchase a limited number of torpedoes from Whitehead & Company, an English corporation, containing said superheater inventions. That petitioner on same day replied by telegraph that it desired to render every assistance to the Government on a proper business basis. That thereupon, and on or about June 17, 1907, the officers of petitioner conferred with Admiral Mason, Chief of the Bureau of Ordnance, at Washington, and it was agreed between them that the Government might purchase not more than 100 torpedoes from Whitehead & Company, *to contain said patented superheaters,* the amount of the royalty for the use therein of said superheater inventions to be later settled and agreed upon by the defendant and petitioner. *And thereupon, on June 17, 1907, petitioner sent its written consent to Whitehead & Company to sell to defendant 100 such torpedoes containing said superheaters. That it was understood and tacitly agreed between petitioner and the officers of de-*

fendant that the royalties to be paid petitioner should become due and payable when the torpedoes containing said superheaters should be brought within the United States and delivered to defendant, and be put into use by defendant under petitioner's patents therefor. That *then or* subsequently defendant *ordered* of Whitehead & Company, *and contracted with them for the manufacture and delivery,* pursuant to said agreement, *of* 50 torpedoes containing said superheater inventions, which *torpedoes* were, as petitioner is informed and believes, *delivered to defendant in a foreign country in sundry lots, each of which was paid for at such times of delivery, and each of which lots were* brought into the territory of the United States *and were delivered to defendant's torpedo station at Newport, R. I., all on the following dates, respectively, viz.:*

Torpedoes	*Delivered and Paid for*	*Imported into United States*	*Delivered at Newport*
5	*Dec. 18, 1907*	*Dec. 30, 1907*	*Jan. 6, 1908*
5	*Jan. 30, 1908*	*Feb. 10, 1908*	*Feb. 18, 1908*
5	*Feb. 15, 1908*	*Feb. 26, 1908*	*Mar. 2, 1908*
20	*June 27, 1908*	*July 7, 1908*	*July 9, 1908*
15	*July 15, 1908*	*July 25, 1908*	*Aug. 19, 1908*

and that none of the superheaters in said torpedoes so imported and received by the defendant were put into use under petitioner's patents until after June 1, 1908, and that all thereof were so put into use prior to the beginning of the present action.

(*d*) That on or about November 9, 1907, defendant, through its said Bureau of Ordnance, by letter bearing said date, stated, "The Bureau desires to take the subject of royalties under consideration for final settlement and requests that the

company will submit proposals covering the following points: * * * (b) Royalty to be paid by the Government for the manufacture of gyro and superheater for installation in Whitehead or other type of torpedo. (c) Price to be paid for superheaters and gyros manufactured by the E. W. Bliss Company and installed by the Government in Whitehead or other type of torpedoes." That thereupon petitioner replied by letter dated November 25, 1907, "Referring to your letter of November 9th, in regard to royalties on Bliss-Leavitt torpedo, and in confirmation of verbal proposition made by the officers of this company to you at Sag Harbor a few days ago, beg to state that we consider the following royalties and prices to be fair. * * * (3) Royalty to be paid by the Government for the manufacture of superheaters for installation in Whitehead or other type of torpedo, five hundred dollars ($500.00). (4) Price to be paid for superheaters manufactured by E. W. Bliss Company and installed by the Government in Whitehead or other type of torpedoes, six hundred fifty dollars ($650.00)."

(*e*) That defendant, through its said Bureau, by letter dated November 29, 1907, acknowledged receipt of said letter of November 25, 1907, and stated that the matter would be laid before the Torpedo Board at its meeting on December 3, 1907, and invited petitioner to attend. That petitioner, by its executive officers, attended said meeting and explained the reasonableness of said royalty to the members of the Torpedo Board.

(*f*) That thereafter, and on or about June 4, 1908, by contract bearing said date, the defendant agreed to pay petitioner six hundred fifty dollars

($650.00) each, for twenty superheaters containing said patented inventions and improvements, or some of them. *That defendant thereby to such extent accepted petitioner's proposal of November 25, 1907, and that it was well understood between petitioner and defendant that of such purchase price $500 was the royalty for use of said patents.* That said contract was duly performed and the price paid.

(*g*) That defendant, on or about December 12, 1910, by letter bearing said date, referred to the superheater royalty specified in petitioner's letter of November 25, 1907, and requested a reduction thereof. That petitioner replied by letter dated December 20, 1910, declining to reduce the amount of said royalty.

(*h*) That thereafter, and on or about April 18, 1911, by contract bearing said date, *the defendant agreed to pay petitioner $650 each for seventy-five* superheaters containing said patented inventions and improvements or some of them. *That defendant thereby again accepted petitioner's said proposal, it being understood that of such purchase price $500 was the royalty for use of said patents.* That said contract was duly performed and the contract price paid.

(*i*) That defendant, by letter dated April 27, 1911, requested additional superheaters to replace ones on which the royalty had already been paid, and requested that for this reason the price for these new superheaters be reduced. That, accordingly, on or about June 16, 1911, by contract bearing said date, petitioner agreed to supply 100 superheaters containing said patented inventions and improvements or some of them at two hundred dol-

lars ($200.00) each. *That said price was arrived at by deducting from the total price of $650 the royalty of $500, and adding an extra remuneration to petitioner of $50 for each superheater so contracted for.* That said contract was duly performed and the purchase price paid.

(*j*) That thereafter, and on or about March 13, 1912, by letter bearing said date, defendant repeated its request of December 20, 1910, for a reduction of the five hundred dollars ($500.00) royalty for superheaters. That petitioner by letter dated March 19, 1912, declined to grant any reduction and no reduction has ever been granted, and petitioner has never consented to *receive for* the use of said patented inventions or said patented improvements thereon or any of them by defendant *a less compensation than* said royalty of five hundred dollars ($500.00) each.

10. That in addition to the fifty torpedoes purchased by defendant from Whitehead & Company, as set forth in paragraph 9 (*c*) of this petition, defendant has purchased from the same company other torpedoes containing superheaters *according to the inventions of said Leavitt patents and containing some or all of the improvements of said Sodeau patents, and on information and belief petitioner avers that said purchases were as follows:*

130 torpedoes on or about July 7, 1908;
180 torpedoes on or about March 29, 1911; and
50 torpedoes on or about October 25, 1911;

that these allegations are made on information given petitioner by the Navy Department, and petitioner understands that the dates named are those

when contracts were entered into with said Whitehead & Company for the manufacture and the subsequent delivery to defendant of said torpedoes to the numbers stated; and that all of said torpedoes were manufactured and were, subsequent to such dates respectively, delivered to defendant, and that all were so delivered and put into use prior to May 2, 1913.

That, in addition, defendant has made since April 15, 1913, or is engaged in making, 100 superheaters in the United States which contain said patented *inventions* and said patented improvements thereon or some of them.

And that all of said purchases, so far as concerns the superheaters in or adapted to said Whitehead torpedo, and all of said manufacture of superheaters by defendant, have been with petitioner's consent and license and with the understanding and expectation by petitioner that petitioner should receive therefor its royalty for said superheaters as hereinbefore stated.

10a. That subsequently to April 10, 1905, and after the invention and development and practical introduction of said *outside* or Armstrong superheater, and prior to June 14, 1907, as petitioner is informed and believes, said Armstrong Company licensed said Whitehead & Company to use and exercise the inventions set forth in the patents recited in paragraph 5 of this petition under the corresponding Letters Patent of Great Britain for said inventions respectively, said license having been expressly subject to the rights of petitioner under said instrument of April 10, 1905 (Appendix A); and that subsequent to such license to said Whitehead & Company, and prior to June 14, 1907, and immediately preceding said latter date, said White-

head & Company (being then in privity with said Armstrong Company concerning the premises) informed the Bureau of Ordnance of the United States Navy Department that they (Whitehead & Company) were not at liberty to sell Whitehead torpedoes to the United States containing the so-called Armstrong superheater without the express permission of petitioner, and that such action by Whitehead & Company was taken because they knew that under said instrument (Appendix A) petitioner alone had the right to sell such superheaters to the United States; and that the Chief of the Bureau of Ordnance so informed petitioner on or about June 14, 1907, when (as stated in paragraph 9 of this petition) the defendant requested petitioner's permission to purchase torpedoes from said Whitehead & Company containing said superheater inventions, and that defendant requested such permission from petitioner because defendant well knew of such instrument (Appendix A) and that under its provisions petitioner alone had the right to sell such Armstrong superheaters to the United States.

11. That the fair and reasonable royalty for each of said superheaters is $500.00, which is also the stipulated and agreed royalty as above stated.

12. That petitioner on or about May 2, 1913, and at various other times, has demanded from defendant payment of said royalty of $500 for each of the 510 superheaters referred to in the preceding paragraphs of this petition, but defendant has wholly failed and neglected to pay any part thereof, and, by reason of the premises, the defendant is justly indebted to your petitioner in the sum of two hundred and fifty-five thousand dollars ($255,000), which sum is still due and unpaid.

13. That the petitioner is the sole owner of the claim set forth in this petition, no assignment or transfer of the said claim or of any interest therein having ever been made, and that petitioner is justly entitled to the amount herein claimed from the United States after allowing all just credits and offsets.

14. That no action upon your petitioner's claim has been had by or before Congress or any executive department of the Government, except that petitioner brought the subject of its claim to compensation for the use of said invention by the United States to the attention of the Secretary of the Navy by letter of May 2, 1913, and that thereafter your petitioner was informed by the Assistant Secretary of the Navy that the necessary proceedings for the consideration and adjustment of said claim should be instituted in this Honorable Court.

15. That petitioner is, as aforesaid, a domestic corporation, organized under the laws of West Virginia, and that petitioner has at all times borne true allegiance to the Government of the United States and has not in any way voluntarily aided, abetted or given encouragement to rebellion against the said Government; that neither petitioner nor any assignee of petitioner's has at any time brought or has now pending in any court any suit or process against any other person, firm or corporation acting or professing to act mediately or immediately under the authority of the United States for or in respect of the claim herein presented.

16. That the facts stated in this petition are true.

Whereupon your petitioner asks judgment in its favor against the United States for the said sum of $255,000.00.

The petitioner's address is Brooklyn, New York. The address of its attorney, Arthur C. Fraser, is 170 Broadway, New York, N. Y.

E. W. BLISS COMPANY,

By
(Signed) F. C. B. PAGE,
Vice-President.

ARTHUR C. FRASER,
Attorney for Claimant.

FRANK H. PLATT,
ARTHUR C. FRASER,
Of Counsel.

EASTERN DISTRICT OF NEW YORK,
CITY OF NEW YORK,
BOROUGH OF BROOKLYN, } ss.:

F. C. B. PAGE, being duly sworn according to law, says that he is the Vice-President of the E. W. Bliss Company, the petitioner named in the foregoing amended petition; that he has read the said petition and knows the contents thereof, and that the facts stated in the said petition are true to the best of his knowledge, information and belief.

(Signed) F. C. B. PAGE.

Sworn to and subscribed to before me this day of February, 1918.

MOSES ARONSON,
Notary Public #83,
Kings Co., N. Y.

(Notary's Seal)

APPENDIX A.

[N.B.—This appendix is printed in full following the first Amended Petition (filed March 28, 1917), pages 15-19.]

Appendix 7.

IN THE

COURT OF CLAIMS OF THE UNITED STATES.

E. W. BLISS COMPANY vs. THE UNITED STATES.	No. 32,838.

Motion for Leave to File Petition for Rehearing.

Now comes plaintiff, E. W. Bliss Company, and moves for leave of Court to file the accompanying petition for rehearing and printed brief in support thereof.

This motion is based upon plaintiff's "Second Amended Petition" submitted to the Court with a petition for leave to file the same on or about February 18, 1918.

It is based also on the grounds and reasons set forth in said petition for rehearing, and more fully set forth in the printed brief accompanying the same.

It is also based on the affidavit of Arthur C. Fraser annexed hereto.

NOTICE IS GIVEN to the defendant that the foregoing motion will be presented to the Court or a judge thereof on the

day of February, 1918, at o'clock in the or as soon thereafter as counsel can be heard.

E. W. BLISS COMPANY,
Plaintiff,
By its Attorney,
ARTHUR C. FRASER.

To the
ATTORNEY GENERAL,
Attorney for Defendant.

STATE OF NEW YORK,
CITY AND COUNTY OF NEW YORK, } ss.:

ARTHUR C. FRASER, being duly sworn, says:

I am of counsel for E. W. Bliss Company, plaintiff in this suit, and have had the active charge thereof in association with Frank H. Platt, Esq., as senior counsel.

I refer to my affidavit verified February 14, 1918, attached to the "Petition for Leave to File Second Amended Petition," and reaffirm the statements therein made.

The reasons why the petition for rehearing now presented was not filed within sixty days after December 3, 1917, are as stated in my said affidavit. I further state that the principal and most important matter decided by the Court in its opinion filed December 3, 1917, and its order of that date, namely, the question as to whether plaintiff's petition states a cause of action *ex contractu*, constituted that part of the present case which had been especially dealt with by said Frank H Platt, who

prepared the brief dealing therewith, filed on or about October 23, 1916, and who personally attended before the Court and made argument thereon on November 21, 1916. For this reason, upon receiving the Court's opinion of December 3, 1917, I at once forwarded it to Mr. Platt and asked him to take the matter up and to advise me if he desired a personal conference with me. I expected that he would deal with this aspect of the case with or without such conference. I was closely occupied during the last half of December and all of January with other pressing legal matters, especially certain urgent suits, and assumed that this case was receiving the attention of Mr. Platt. Toward the end of January I telephoned his office to see what progress was being made, and was then informed that he had been confined to his residence with a serious illness for some weeks, and on further inquiry learned that he had been unable to take up this case. Accordingly, I took it up myself immediately and proceeded to study the entire case and to determine alone what course should be taken, and to prepare the necessary papers. As before stated, I did not learn until January 29 that an order had been entered on December 3, 1917, limiting the time for filing an amended petition; I did not then understand that there was any fixed limit of time within which to present a petition or motion for rehearing. Although I examined the rules of Court, I found only Rule 61 limiting the time for similar motions, but this rule is limited to "A motion for a new trial" and follows Rules 85-88 concerning trials, and I construed and understood it as relating to motions for new trials upon the merits after final hearing upon evidence and argument, and as being limited to such action of the Court as

results in the final judgment. Even had I understood the rule as covering the case of an interlocutory order, such as that of December 3, 1917, it would have been impossible for me to have prepared the papers and presented such motion for rehearing within sixty days from the filing of said order, and in any event it would have been practically impossible to have performed the thorough investigations of fact and law which I have made in this case, and to have prepared the several papers submitted in any shorter time than was actually taken. I further state that, to the best of my information and belief, the delay has not in any way prejudiced the defendant or the Attorney General, and that, in my opinion, the consideration by the Court of the petition for rehearing and brief thereon is essential in order that justice may be done in this case.

ARTHUR C. FRASER.

Subscribed and sworn to before me this 18th day of February, 1918.

T. F. WALLACE,
(Seal) Notary Public (19),
New York County, N. Y.,
N. Y. County Register's No. 9006

[Submitted February 19, 1918; filed June 3, 1918.]

Appendix 8.

IN THE

COURT OF CLAIMS OF THE UNITED STATES.

E. W. BLISS COMPANY vs. THE UNITED STATES.	No. 32,838.

Petition for Rehearing.

Now comes the plaintiff, E. W. Bliss Company, and petitions the Court for a rehearing and reargument upon defendant's demurrer and motion to strike out, upon which the opinion and order of the Court dated December 3, 1917, were based; and for a reversal of the holding in said opinion and order. The present petition is in part based upon the second amended petition of plaintiff filed on or about February 15, 1918, which makes a fuller and more complete showing of facts.

In support of this petition the following grounds are presented:

1. The Court, in said opinion, reaches the conclusion that plaintiff's petition (except perhaps as to the first 50 Whitehead torpedoes containing superheaters) is not based upon contract, express or implied. This conclusion is apparently based upon the understanding or inference that the Government did not recognize plaintiff's patents or plaintiff's title thereto, but proceeded to adopt and use the superheater invention in torpedoes without

asking plaintiff's permission and in tortious defiance of plaintiff's patents and plaintiff's rights thereunder. It is submitted that this conclusion is unwarranted from the facts averred in plaintiff's first amended petition, namely, that the Government has for many years purchased the Bliss-Leavitt torpedoes from the petitioner (paragraph 2); that the defendant requested a list of petitioner's patents covering the Bliss-Leavitt torpedo, and the amount of royalty which petitioner would charge defendant for the use thereof, and that petitioner furnished such list, which included said superheater patents; and that subsequently defendant requested permission from petitioner to purchase a limited number of Whitehead torpedoes containing said superheater inventions; and that petitioner granted said request and agreed with the defendant that the Government might purchase not more than 100 such torpedoes from Whitehead & Comapny, "the amount of the royalty for the use therein of said superheater inventions to be later settled and agreed upon by the defendant and petitioner"; and that subsequently defendant, pursuant to said agreement, bought 50 such torpedoes from Whitehead & Company; and that subsequently defendant again asked petitioner to submit proposals covering royalties under the plaintiff's patents for superheaters for installation in Whitehead or other type of torpedo, and that petitioner thereupon proposed certain royalties therefor, namely, a royalty of $500 for such superheaters, and offered to manufacture the superheaters for the Government for $650 (an amount which inferentially included said royalty of $500); that petitioner by invitation appeared before a board and explained the reasonableness of said royalty; that thereafter the Government on two occasions purchased super-

heaters at $650 each (thereby inferentially accepting petitioner's proposal and acquiescing in the reasonableness of said $500 royalty); and then, on another occasion, defendant asked petitioner to supply certain superheaters to replace ones on which the royalties had already been paid (thereby again inferentially acknowledging petitioner's right to such royalty), and accordingly petitioner supplied these additional superheaters at a reduced price of $200 each; subsequently defendant asked plaintiff to reduce said $500 royalty for superheaters (thereby inferentially admitting plaintiff's right to a royalty therefor and disputing only the amount of such royalty), but plaintiff declined to reduce such royalty and has never consented to any reduction thereof (Petition, paragraph 9). A further support for plaintiff's contention that its transactions with the defendant constituted a contract is found in the allegations contained in paragraph 10a of the amended petition. Plaintiff respectfully submits that in these successive transactions the Government uniformly evinced a desire and intention to use said superheater inventions in Whitehead or other torpedoes with plaintiff's consent, and under license from plaintiff, and not in tortious defiance of plaintiff's rights. The only points in the series of transactions at which it can be said that the minds of the parties did not meet, occurred when the amount of royalty for the use of superheaters in the first torpedoes purchased from Whitehead & Company was unagreed upon and left for later determination, and when the Government subsequently asked plaintiff to reduce the royalty of $500, which plaintiff refused to do; at other times, and intervening these two occasions, the Government repeatedly acquiesced in plaintiff's right to royalty, and in the fixing of said royalty

at $500 per superheater, by reason of its successive purchases of superheaters with royalty included at $650, and of superheaters to replace those on which the royalty had been paid, at $200 each (said amount of $200 being equal to the originally proposed price of $650, less the $500 royalty and plus an increased price to plaintiff of $50 each). It was not until long after the agreement or meeting of minds involved in these recited transactions that the Government, through the Secretary of the Navy, refused to acknowledge and pay plaintiff's claim, and referred plaintiff to this Court (paragraph 14 of Petition). Such action could not abrogate or rescind the license contract previously entered into, and justifies no other inference than that the Navy Department had no appropriation out of which it could lawfully pay plaintiff's claim.

Plaintiff therefore submits that the facts set forth in the petition bring this case into that class wherein the Supreme Court of the United States has held that the facts justified the implication of a contract to pay for an agreed and permitted use of a patented invention, namely:

> *Palmer* v. *United States*, 128 U. S., 662;
> *United States* v. *Burdan*, 156 U. S., 552;
> *Societe Cail* v. *United States*, 224 U. S., 309;

and that the facts pleaded bring this case within the broader ground set forth in the following decisions, wherein the Supreme Court of the United States found that the Government, in taking private property for public use, is deemed to have done so with intent to make just remuneration therefor, and not as a tortious taking of property

in disregard of the rights of the owners thereof, viz.:

United States v. *Great Falls,* 112 U. S., 645, 656.
Hollister v. *Benedict,* 113 U. S., 59.
United States v. *Lynah,* 188 U. S., 445.

2. Said opinion of the Court, in discussing plaintiff's title to the Sodeau patents, holds that plaintiff has not such legal title thereto as would support an action for infringement, and that, therefore, the present action by plaintiff cannot be sustained under the Act of June 25, 1910, 36 Stat., 851. But, in fact, plaintiff has not claimed under the Act of 1910, but has based its claim primarily and chiefly upon the allegation that plaintiff entered into a contract, express or implied, with the defendant (although plaintiff has not intended that its petition should exclude relief on the ground of infringement, so far as concerns matters occurring since June 25, 1910, if on the trial the Court should find that plaintiff's allegations as to a contract were not borne out by the evidence). The Court has therefore failed to pass upon plaintiff's contention that its title or grant of rights from the Armstrong Company under the Sodeau patents is ample to sustain the present action upon the theory of contract.

3. Said opinion of the Court has discussed only the so-called Sodeau or Armstrong patents and the effect and extent of plaintiff's title thereto; and has not considered the Leavitt patents, as to which plaintiff has unquestionable legal title. The importance of an omission of consideration of the Leavitt patents is apparent from the allegation in the original petition that the Sodeau patents "are subservi-

ent to said patents Nos. 693,871 and 693,872 (being the Leavitt patents) and could not be used in torpedoes without employing the invention covered by said last-named patents"; and further, from the following allegation in paragraph 6-a of the second amended petition, viz.:

> "6-a. That the main benefit and advantage of superheaters in torpedoes is due to the inventions of said Leavitt patents, which were pioneer or generic inventions which for the first time in the art enabled the energy stored in the compressed air to be increased before utilizing such air to propel the engine driving the torpedo; and that the improvements of said Sodeau patents above named were directed to the more convenient location of the superheaters and to details of construction concerning them, and said Sodeau inventions were in the nature of improvements carrying forward or extending the results of the pioneer inventions of said Leavitt patents and were not themselves pioneer or generic inventions";

from which it appears that plaintiff's claim rests mainly upon the Leavitt patents for the generic invention, and not upon the Sodeau patents for the specific improvements.

The Court in said order directs that "no evidence is allowed to be taken in this case" concerning petitioner's claim for 460 superheaters (being all except the 50 superheaters set forth in paragraph 9 of the amended petition); but it is submitted that, even if it were found that petitioner was unable to prove its allegations as to contract, petitioner would, in any event, be entitled to prove acts of infringement by the defendant under the Act of June 25, 1910, 36 Stat., 851. Accordingly, petitioner is entitled (under any theory) to offer evi-

dence at least concerning purchases and use of the patented superheaters by the defendant subsequent to the date of said Act. Accordingly petitioner prays a modification of said order to enable plaintiff to prove all superheaters made, acquired or used by defendant which come under the said Leavitt patents.

Dated February 18, 1918.

E. W. BLISS COMPANY,
By its Attorney,
ARTHUR C. FRASER.

I hereby certify that the foregoing petition for rehearing is, in my opinion, well founded in point of law, and is not interposed for purposes of delay.

ARTHUR C. FRASER,
Of Counsel.

[Submitted February 19, 1918; filing denied.]

Appendix 9.

IN THE

COURT OF CLAIMS OF THE UNITED STATES.

E. W. BLISS COMPANY vs. THE UNITED STATES.	No. 32,838.

Assignment of Errors.

The plaintiff-appellant, E. W. Bliss Company, presents with its accompanying application for appeal the following assignment of errors.

1. The Court erred in holding and deciding that plaintiff's petition does not set forth a cause of action *ex contractu*.

2. The Court erred in holding and deciding that plaintiff's petition does not set forth a cause of action *ex contractu* except as to superheaters in the first 50 torpedoes referred to in paragraph 9.

3. The Court erred in holding and deciding that as to such 50 torpedoes plaintiff's claim is not so set forth in its petition as to negative the bar of the Statute of Limitations.

4. The Court erred in holding and deciding that as to the remaining 460 superheaters set forth in plaintiff's petition, such petition sets forth no cause of action, and in refusing to allow plaintiff to take evidence in support of its claim for compensation therefor.

5. The Court erred in holding and deciding that plaintiff's petition as amended does not set forth such title to the patents claimed under as will support plaintiff's claim to recover compensation for the purchase and use by defendant of torpedoes or superheaters therefor, containing the patented inventions.

6. The Court erred in holding and deciding that plaintiff's petition does not set forth legal title in plaintiff to the Leavitt patents recited in paragraph 4.

7. The Court erred in holding and deciding that plaintiff's petition as amended does not set forth such title or rights in plaintiff to or under the Armstrong Company's patents recited in paragraph 5, sub-paragraphs (*a*) to (*h*) inclusive, as enabled plaintiff to enter into an agreement with defendant for the purchase and use by defendant of torpedoes or superheaters containing the patented inventions, and entitled plaintiff to recover compensation for such use.

8. The Court erred in denying plaintiff's petition to file the second amended petition.

9. The Court erred in denying plaintiff permission to file so much of said second amended petition as was within the authorization to amend contained in the Court's order of December 3, 1917, namely, the amendments to paragraph 9 contained in sub-paragraph (*c*).

10. The Court erred in holding that plaintiff was in default in failing to amend its petition as required in the Court's order of December 3, 1917, within the time (January 15, 1918) limited in said order, in view of the showing that neither plain-

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tiff's attorney nor counsel had been served with said order or otherwise notified thereof, and the plaintiff and its counsel had no knowledge of the time limit in said order until after said time had expired.

11. The Court erred in refusing to excuse the alleged default of plaintiff in failing to so amend its petition within the time (January 15, 1918) limited in said order of December 3, 1917, in view of the showing on plaintiff's motion that plaintiff's attorney of record was then mortally ill and died five days after the entry of said order, that plaintiff's other counsel were remote from the Court, and its senior counsel was immediately afterward incapacitated by serious illness from attending to any business, and the remaining counsel did not learn of the entry of said order, or of said time limit, until after said time had expired, and although preoccupied with other court engagements, diligently proceeded to procure information and prepare such second amended petition and a petition for leave to file the same, and a brief thereon, and other papers, and filed all such papers February 18, 1918.

12. The Court erred in denying plaintiff's petition for rehearing in the face of the showing in such petition that the Court had erred in matter of law, in holding that plaintiff's petition did not, except as to the first 50 torpedoes or superheaters therefor set forth therein, set forth a cause of action *ex contractu*.

13. The Court erred in dismissing plaintiff's petition.

14. The Court erred in dismissing plaintiff's petition *in toto* under Rule 18 of the Rules of the Court

of Claims, when the alleged uncertainty as to when its claim first accrued applied to only 50 torpedoes, and the petition was free from uncertainty as to the remaining 460 torpedoes or superheaters therefor, on which plaintiff's petition is based.

15. The Court erred in dismissing plaintiff's petition as to 330 torpedoes or superheaters therefor as to which said petition avers that defendant purchased or has made the same at dates since June 25, 1910, and as to which plaintiff has a cause of action for infringement under the Act of June 25, 1910 (36 Statutes, 851).

WHEREFORE plaintiff-appellant prays that the order of the Court of Claims dismissing plaintiff's petition may be reversed and remanded with direction to the Court of Claims to accept and file plaintiff's second amended petition and to proceed with the trial of this suit thereon.

Dated, September 4, 1918.

E. W. BLISS COMPANY,
Plaintiff-Appellant,
By its Attorney,
ARTHUR C. FRASER.

BRIEF

In Support of the Foregoing Petition.

The record as certified by the Court of Claims is deficient in that it omits certain papers and proceedings necessary to enable appellant to bring into issue on this appeal the points set forth in several of the assignments of error.

Statement.

The original petition (Appendix 1, p. 6) set forth the ownership by plaintiff of patents for a "superheater" used in automobile torpedoes, viz., two patents to Leavitt, granted in February, 1902; also the issue of subservient patents for certain improvements to Armstrong, Whitworth & Co. for inventions of one Sodeau, which patents, issued in 1906 to 1911 inclusive, "could not be used in torpedoes without employing the invention covered by said" Leavitt patents; that by a written instrument ap- plaintiff acquired certain sole, full and exclusive rights thereunder. And after formal recitations as to inventorship, etc., it averred:

That in 1906 the Bureau of Ordnance of the Navy Department asked what royalty the plaintiff would charge defendant for the use of these patents, and plaintiff proposed certain royalties; that in 1907 plaintiff agreed with the defendant that it might purchase certain Whitehead torpedoes containing the patented inventions, the royalty to be settled later, and the defendant did purchase 50 torpedoes accordingly; that in 1907 plaintiff proposed a royalty of $500 for superheater inventions, or would supply the superheaters for $650, and in 1908 defendant purchased superheaters at such price of $650, and again in 1911 it made further purchases:

that defendant repeatedly asked plaintiff to reduce this royalty below $500, but plaintiff always declined. That defendant has since purchased other torpedoes containing the superheater inventions, namely: 130 in July, 1908; 180 in March, 1911; 50 in October, 1911, and has made 100 superheaters since April, 1913, making a total of 510 superheaters.

That the fair and reasonable royalty for said superheaters is $500, which is also the agreed royalty. That said royalties have been demanded, but never paid, and other formal averments.

Defendant moved (Appendix 2, p. 17) to dismiss this petition on the grounds that the facts stated showed neither expressed nor implied contract to pay the royalties demanded.

On this motion (in effect a demurrer) briefs were filed, and an argument was had, and the Court dismissed the motion. No opinion was filed, but from expressions of the Judges during the argument it was clear that they regarded the petition as setting up a case of contract, either express or implied, to pay royalties for the use of plaintiff's inventions. As the motion (or demurrer) was directed to the sole question as to whether the petition pleaded a cause of action in contract, of which alone the Court had jurisdiction (since the first portions of the cause of action arose prior to the Act of June 25, 1910), the Court's action admitted of no other interpretation than that the pleading set forth a cause of action *ex contractu*. Thenceforth, the plaintiff's counsel regarded this as the settled law of the case in the Court of Claims.

Defendant next moved (Appendix 3, p. 18) to strike out paragraphs 5, 6, 8 and 8*a* from plaintiff's petition. This motion applied solely to the Sodeau patents and was on the ground that plaintiff had

not legal title thereto, but was only a licensee, and as such had no right to maintain this suit. Briefs were filed and oral argument had on December 13, 1916, and the Court ordered plaintiff to file a copy of the written instrument under which it claimed title to the Sodeau patents, with leave to amend its petition (Certified Record, p. 1).

Thereupon plaintiff filed its Amended Petition with said instrument as "Appendix A" (see Certified Record under II). But without comparing the Amended Petition with the original Petition (Appendix 1) it is not apparent what amendments were made, nor what was the form of plaintiff's claim at the time when the Court dismissed the original motion (demurrer), thereby sustaining plaintiff's cause of action *ex contractu*.

On April 7, 1917, defendant filed a demurrer and motion to strike out (Appendix 4, p. 20), directed solely to those paragraphs of plaintiff's petition avering the Sodeau patents and plaintiff's title thereto, the sole ground of demurrer being a denial of plaintiff's title to said patents and of its right to sue thereon.

This demurrer and motion (Appendix 4) is not given in the official record. Without this it might be inferred that the demurrer ran to the entire pleading.

After filing briefs the motion was argued May 23, 1917, whereupon the Court, instead of deciding the questions at issue, entered the order of May 28, 1917 (see IV, Certified Record).

This order led defendant to file a new and more comprehensive demurrer (see Certified Record under V). This demurrer includes the following ground, which went back and reasserted the ground on which defendant's first motion to dismiss (or demurrer) was based, viz.:

> "1. That the facts and things alleged in said petition do not make or constitute any cause of action against defendant, nor any cause of action of which this court has jurisdiction."

Defendant appended to this demurrer a memorandum brief, saying, *inter alia:*

> Defendant submits that the filing of the amended petition is a commencement of the suit *de novo*. It, therefore, demurs, first, to the amended petition as a whole on the ground that the Court is without jurisdiction, because no contract can be implied as to the 510 torpedoes (par. 10, Petition), for which recovery of royalties is sought. The suit is wholly upon an alleged *implied* contract, and no infringement is charged. Defendant submits that the things alleged (par. 9) do not constitute a "meeting of minds," nor show any implied contractual relation as to any of the 510 torpedoes complained of.

As the case had been three times argued orally, and several briefs already filed, discussing all questions at issue, the counsel agreed to submit this demurrer on the briefs without further argument (see Verification, *supra*, p. 5).

December 3, 1917, the Court filed an Opinion (Certified Record under VII), holding, in substance (briefly stated): (1) that except as to 50 superheaters, the purchase of which from Whitehead was authorized in June, 1907, there was no showing of a cause of action *ex contractu;* (2) that as to the Sodeau patents plaintiff had not sufficient title to sustain the action (but not mentioning the prior and broader Leavitt patents as to which plaintiff's

assertion of title was unquestionable); (3) that as to such 50 superheaters, the dates of purchase were not stated with sufficient definiteness to establish that they were not within the bar of the Statute of Limitations, and plaintiff was directed to amend the petition in this respect; and (4) that as to the remaining 460 torpedoes, the demurrer was sustained. The same day an order was entered (see Certified Record under VIII) to like effect, requiring plaintiff to amend by January 15, 1918.

The Court thus (except as to 50 torpedoes) reversed its holding of December 4, 1916, overruling the original motion to dismiss (demurrer). This reversal was on the same briefs and without additional argument.

At this time plaintiff was represented by:

L. S. Bacon, local attorney, Washington;
Frank H. Platt, of counsel, New York;
Arthur C. Fraser, of counsel, New York.

On December 3, 1917, Mr. Bacon was lying mortally ill with pneumonia, from which he died on December 6, 1917. Because of his illness and death the channel through which the New York counsel had information of the doings of the Court was closed. Mr. Fraser learned of Mr. Bacon's death several days thereafter and thereupon caused an inquiry to be made at the Clerk's office to see if any decision had been rendered and received printed copies of the decision of December 3, 1917, but no copy of any order (Affidavit, *supra*, p. 23). He at once sent a copy of the opinion to Mr. Platt and requested a conference with him, but learned shortly afterward that Mr. Platt was confined to his home by a serious illness which ever since that time incapacitated him from conducting legal business (*supra*, p. 23). Mr. Fraser accordingly (un-

der the circumstances stated, *supra,* pp. 13-24 and 46-48) took up the preparation of an amended petition and a petition for rehearing.

He presented February 18, 1918, a power of attorney and motion that he be substituted in place of Mr. Bacon, which was allowed by the Court June 3, 1918.

On February 18, 1918, he presented a Second Amended Petition (see Appendix 6, p. 25) and a motion for leave to file such second amended petition (see Appendix 7, p. 45).

On February 19, 1918, he presented a Petition for Rehearing (see Appendix 8, p. 49) and filed a motion for leave to file such petition for rehearing (see Appendix 7, p. 45).

The Court took no action on these proceedings until June 17, 1918, when it denied both motions and entered final judgment against plaintiff on the ground that it was in default for non-compliance with the order of December 3, 1917 (see Certified Record under X).

All the circumstances concerning the alleged default are stated in Mr. Fraser's affidavits (*supra*, pp. 22-24 and 46-48).

Argument.

The following reasons are submitted why the several papers omitted from the Certified Record and named in the foregoing Petition for Certiorari should be included in the Record on appeal:

1. The original Petition (Appendix 1, p. 6), or so much thereof as differs from the Amended Petition, should be included in order that the effect of the decision of the Court of Claims of December 4, 1916, may be seen. The original Petition is identical

with the Amended Petition in every respect except as to the allegations concerning plaintiff's title to the Sodeau patents. There are thus presented two distinct questions for this Court on appeal, viz.: (1) as to whether plaintiff's pleading sets forth a cause of action *ex contractu*, and as to this the original Petition and Amended Petition are the same: (2) as to whether plaintiff has title to the Sodeau patents. As to this the Amended Petition is different, and is alone sufficient.

2. Defendant's Motion to Dismiss (Appendix 2, p. 17) should be included in the Record, because without it the decision of the Court of Claims of December 4, 1916, overruling this Motion, is not apparent.

It is submitted that appellant is entitled to the benefit of showing to this Court that on a pleading unchanged in so far as affects this question the Court of Claims decided, in December, 1916, that plaintiff set forth a cause of action *ex contractu*, and that, in December, 1917, said Court decided to the precise contrary.

3. Defendant's Motion to Strike Out (Appendix 3, p. 18) should be included in the Record in order that appellant may show that defendant apparently acquiesced in the ruling of the Court of December 4, 1916, and the Motion and argument thereon went solely to questions concerning plaintiff's title to the Sodeau patents.

4. Defendant's Demurrer and Motion (Appendix 4, p. 20) should be included in the Record in order that appellant may show that after the filing of plaintiff's Amended Petition the defendant still limited its Motion to an attack upon plaintiff's title to the Sodeau patents. Without this paper in the

Record it does not appear what issues were argued May 23, 1917, nor on what the Court's Order of May 28, 1917 (Certified Record under IV), was based.

With these papers in the Record it will become apparent that defendant, in its substituted Demurrer (Certified Record under V), broadened the issue to bring up again the question of a cause of action *ex contractu* which had been decided in plaintiff's favor December 4, 1916.

5. The Motion for leave to file the Second Amended Petition (Appendix 5, p. 21) should be included in the Record in order to show what plaintiff did in view of the Court's decision of December 3, 1917, and because of the technical default in which plaintiff was placed by its not having complied with the Court's Order of that date to amend its Petition by January 15, 1918. The Court's judgment (Certified Record, X) is based upon "the plaintiff not having complied with the Order of the Court of December 3, 1917, to make the Petition more specific," etc. That this Order was never served upon or otherwise brought to the attention of plaintiff's attorneys is shown by the verification attached to this Motion (Affidavit, *supra*, pp. 22-24). Hence the default was wholly technical. The tenth assignment of error (*supra*, p. 57) avers that the Court erred in finding plaintiff in default, and the eleventh assignment, that the Court erred in refusing to excuse such default under the circumstances.

6. The Second Amended Petition (Appendix 6, p. 25) should be included in the Record, because without it this Court cannot pass upon assignments of error 8 and 9. The new matter in this Second Amended Petition is printed in italics so that its differences from the first Amended Petition may be

easily seen. The amendments thus made are two-fold: (1) those intended to comply with the Court's Order of December 3, 1917, these being the amendments made to paragraph 9, contained in sub-paragraph *c*; (2) the introduction of a more complete statement of the transactions between the plaintiff and the Government, whereby to show more in detail than the original or first Amended Petition that the transactions were essentially contractual and excluded the theory of tort.

Although the third assignment of error questions the Court's holding as to the first 50 superheaters not being so set forth as to be within the Statute of Limitations, it is submitted that appellant should not be confined to this issue on appeal in view of its *bona fide* effort to comply with the requirement of the Court (after it learned of such requirement) by amending its Petition so as to make a more definite statement of the facts. Under the ninth assignment of error the Court should, we contend, have admitted this portion of the Second Amended Petition.

7. Plaintiff's Motion for leave to file the Petition for Rehearing (Appendix 7, p. 45) should be included in the Record in order to show why the Petition for Rehearing was not earlier presented (Affidavit, pp. 26-28). The Court refused to receive the Petition for Rehearing without this Motion on the ground that it was not brought within the time fixed by Rule 90, viz.:

> "Motions for new trial, except as provided by section 1088 of the Revised Statutes (sec. 175 of the judicial code) shall be filed within sixty days from the time the judgment of the court is announced,"

and hence a motion for leave to present the Petition for Rehearing became necessary. Appellant proposes to argue that the Petition for Rehearing was presented in ample and reasonable time; that Rule 90 does not apply to such Petition because it is limited to a motion for a new trial made after final judgment and has no reference to a ruling on an interlocutory proceeding, as in this case, where no final judgment had been entered.

Appellant, however, cannot argue these points without having this motion in the record.

8. The Petition for Rehearing (Appendix 8, p. 49) should be included in the Record in order to enable appellant to argue the twelfth assignment of error, namely, that the Court erred in denying the rehearing in the face of the showing that it had erred in matter of law in holding that plaintiff's Petition did not set forth (except as to the first 50 torpedoes) a cause of action *ex contractu*.

The nature of the showing as to the error of the Court on this question of law, contained in the Petition for Rehearing, cannot be made manifest without the inclusion of the Petition for Rehearing in full in the Record.

Finally, it is submitttd that appellant, in asking a review by this Court of the rulings of the Court of Claims as to matters which ordinarily come within the discretion of the Court, is justified by reason of the arbitrary character of the rulings of the Court of Claims in asking the Supreme Court to review such rulings on the ground that the Court of Claims therein committed abuses of discretion.

The technical default that the Court of Claims insisted on enforcing is one which it should have excused in view of the showing made in the affidavits of plaintiff's attorney. The fact that no actual notice of the Court's Order of December 3, 1917, ever

reached plaintiff's attorneys until after the default had occurred should of itself have induced the Court to reopen the matter and grant additional time for compliance with such Order. It seems that it is the practice of the Court of Claims to expect attorneys to acquaint themselves with the orders entered by applying at the Clerk's office; but nothing to this effect is contained in the Rules of the Court of Claims, and attorneys in New York are not charged with notice of any such custom. Had it not been for the death of Mr. Bacon immediately after the entry of this Order he (being a Washington attorney, practising before the Court of Claims, and presumably familiar with its custom) would doubtless have learned of the Order and communicated it to the New York attorneys. Under the circumstances of his death, and the absence of the remaining attorneys, and the absence of any actual notice to them, and of the reasonable promptness with which action was taken on plaintiff's behalf when notice was received, it is submitted that the Record should be made to contain a sufficiently full copy of all proceedings to enable appellant to maintain its argument before the Supreme Court that the Court of Claims committed an abuse of discretion in enforcing such technical default, and in refusing to permit the filing of the Second Amended Petition (which would have removed all basis for the decision adverse to plaintiff in the Court's opinion of December 3, 1917), and in refusing to entertain the Petition for Rehearing with the showing that the Court had erred on an essential question of law.

ARTHUR C. FRASER,
Attorney for Appellant.

New York, December 14, 1918.